



Original: English

No.: ICC-01/11-01/11
Date: 29 August 2013

THE APPEALS CHAMBER

Before: Judge Anita Ušacka, Presiding Judge
Judge Akua Kuenyehia
Judge Sang-Hyun Song
Judge Erkki Kourula
Judge Sanji Mmasenono Monageng

SITUATION IN LIBYA

IN THE CASE OF

***THE PROSECUTOR v.
SAIF AL-ISLAM GADDAFI and ABDULLAH AL-SENUSSI***

Public

**Response of the Libyan Government to “Observations on behalf of Mishana
Hosseinioun pursuant to Rule 103”**

**Source: The Government of Libya, represented by:
Professor Ahmed El-Gehani
Professor Phillipe Sands QC
Professor Payam Akhavan
Ms Michelle Butler**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Ms. Fatou Bensouda

Counsel for the Defence

Counsel for Saif Al-Islam Gaddafi:

Mr. John R.W.D Jones QC

Ms. Sarah Bafadhel

Counsel for Abdullah Al-Senussi:

Mr. Ben Emmerson QC

Mr. Rodney Dixon

Ms. Amal Alamuddin

Mr. Anthony Kelly

Professor William Schabas

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

Ms. Paolina Massidda

Ms. Sarah Pellet

Mr. Mohamed Abdou

The Office of Public Counsel for the Defence

State's Representatives

Professor Ahmed El-Gehani

Professor Phillippe Sands QC

Professor Payam Akhavan

Ms. Michelle Butler

Legal Representatives of Mishana Hosseinioun

Sir Geoffrey Nice QC

Mr. Rodney Dixon

REGISTRY

Registrar

Mr. Herman von Hebel

Counsel Support Section

Deputy Registrar

Mr. Didier Daniel Preira

Victims and Witnesses Unit

Detention Section

I. INTRODUCTION

1. The Government of Libya hereby files its Response to the “Observations on behalf of Mishana Hosseinioun pursuant to Rule 103 [“the Observations”].”¹
2. In both her application for leave to submit observations and the observations themselves, Ms. Hosseinioun sought to show that her applications before, and the findings of, the African Commission on Human and Peoples’ Rights (“the Commission”) and the African Court on Human and Peoples’ Rights (“the African Court”) were relevant to demonstrating that Libya’s national justice system is unable to try Mr. Gaddafi in Libya and that the ICC should determine that his case is admissible before the ICC.
3. The Government requests that the Chamber dismiss the observations as irrelevant and deficient. None of the observations have any bearing on any relevant issue before the Chamber, including whether the Chamber erred in its determination that the Libyan judicial system is “unavailable”.²

II. REPLY TO OBSERVATIONS

4. In her observations, Ms. Hosseinioun submits that Libya has failed to address and implement any of the provisional measures for the protection of Mr. Gaddafi’s and that these particular, alleged failings “establish beyond doubt that Libya is unable to deliver justice in any national proceedings for Mr. Gaddafi.”³ Specifically, according to Ms. Hosseinioun, that purported failure “lends support to the Pre-Trial Chamber’s finding”⁴ regarding the ability of

¹ ICC-01/11-01/11-414, 22 August 2013; Government granted permission to reply by 29 August 2013 by the Appeals Chamber in ICC-01/11-01/11-404, 15 August 2013.

² The Application for Leave and the Chamber’s grant of leave expressly limited the scope of the observations in this way.

³ The Observations, para. 5.

⁴ *Ibid*, para. 13

Libya in two ways:

- a. She asserts that Libya has not implemented a provisional measure concerning Mr. Gaddafi's access to a lawyer, and notes a Pre-Trial Chamber finding that "[i]f this impediment is not removed, a trial cannot be conducted in accordance with the rights and protections of the Libyan national justice system."⁵
 - b. She also refers to a provisional measure concerning visits by family members and friends, and asserts that Libya has not complied with orders from the African Commission and African Court on this topic. She refers, in particular, to her own efforts to visit Mr. Gaddafi.⁶
5. As observed, it is respectfully submitted that Ms. Hosseinoun's observations are deficient and irrelevant. They amount to an attempt to engage in satellite litigation that undermines due process and the interests of justice. They are, moreover, an attempt to marshal the resources and credibility of the ICC in favour of her own aims.
 6. First, it is plain that the African Commission and African Court's "findings" are not final as to the merits of the allegations made by Ms Hosseinoun.⁷ Indeed, it appears that they are based solely on the material provided by Ms. Hosseinoun, without any investigation or inquiry by the African Commission or the African Court. Further, the Libyan Government has provided information to the ICC outlining developments material to the admissibility assessment.⁸ Ms

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*: Annex 1, p.2 and p.6

⁸ "Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi", 23 January 2013, ICC-01/11-01/11-258- ConfExp, with Annexes 1-23 ("Libya's Further Submissions"), paragraph 97: Minister of Justice stated that Ministry officials "have been in continuous high level contact with the Libyan Law Society and the Popular Lawyers Office in order to select a

Hosseinoun's observations provide no assistance to the Court's assessment of the material before it.

7. Second, Ms. Hosseinoun advances generalized factual allegations without any attempt to address the salient statutory requirements concerning "unavailability" or "inability" or any other question to be considered by the Appeals Chamber in determining Libya's fourth ground of appeal.
8. As a consequence of this failure of analysis, the Observations are contradictory. On the one hand, Ms Hosseinoun alleges that Libya has avoided implementing directives from the African Commission and African Court in order to deprive Mr. Gaddafi of legal representation and from receiving visits.⁹ On the other hand, Ms. Hosseinoun alleges that these *deliberate* failures are indicative of "inability" within the meaning of the Statute. They are, in effect, unsubstantiated allegations purporting to relate to "inability" which are irrelevant to the appeal.

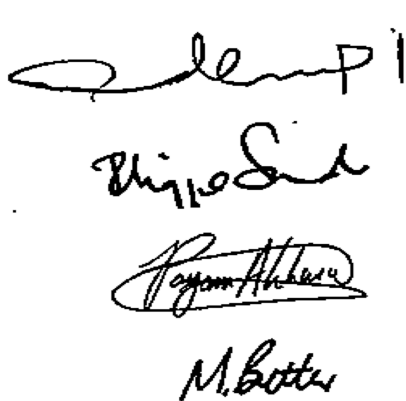
III. CONCLUSION

9. In conclusion, the Government submits that, far from establishing "beyond doubt that Libya is unable to deliver justice in any national proceedings for Mr. Gaddafi", the Observations of Ms. Hosseinoun are of no assistance to the Court in the proper determination of Libya's fourth ground of appeal. The observations should be dismissed as irrelevant and deficient.

suitably qualified and committed highly qualified counsel or a team of defence counsels to represent him during his forthcoming trial"; Libyan Government's consolidated reply to the responses of the Prosecution, OPCD, and OPCV to its further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi", 4 March 2013, ICC-01/11-01/11-293-Conf, with Annexes 1-3 ("Libya's Consolidated Reply"), paragraph 53: "the Libyan Government is in the process of approaching the Bar Associations of Tunisia and Egypt to obtain a suitably qualified and experienced counsel for Saif Al-Islam Gaddafi who will be permitted, together with a Libyan lawyer, to represent Saif Al-Islam Gaddafi in the Libyan proceedings."; ICC-01/11-01/11-370-Red2, 25 June 2013, paragraph 168.

⁹ Example: para. 13: alleging that "Libya has not implemented the Provisional Measures that Mr. Gaddafi be allowed access to a lawyer of his choosing" and that visits have been "blocked" by Libya; para. 50, alleging that, "Libya continues to flout the orders of the African Commission and African Court".

Respectfully submitted:



Professor Ahmed El-Ghani
Professor Phillippe Sands QC
Professor Payam Akhavan
Ms Michelle Butler

*Libyan ICC Coordinator and
Counsel on behalf of the Government of Libya*

Dated this 29th day of August 2013
At London, United Kingdom